IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No.113 of 2003
WITH
APPEAL FROM ORDER No.130 of 2003
AND
APPEAL FROM ORDER No.131 of 2003

For Approval and Signature:

Hon'ble MR.JUSTICE D.A.MEHTA Sd/-

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

ARVINDBHAI RAMBHAI PATEL

Versus

RAMDEV FOOD PRODUCTS PVT. LTD.

Appearance:

1. Appeal from Order No. 113 of 2003
MR MIHIR THAKORE for MR JR SHAH for Appellant Nos. 1-8
MR BJ SHELAT for MR RM CHHAYA for Respondent No. 1

2. Appeal from Order No. 130 of 2003
MR BJ SHELAT for MR RM CHHAYA for Appellant No. 1
MR MIHIR THAKORE for MR JR SHAH for Respondent Nos. 1-8

3. Appeal from Order No. 131 of 2003
MR BJ SHELAT for MR RM CHHAYA for Appellant No. 1
MR MIHIR THAKORE for MR JR SHAH for Respondent Nos. 1-8

CORAM : MR.JUSTICE D.A.MEHTA

Date of Order: 08/05/2003

COMMON CAV JUDGMENT

On 17-03-2003 the City Civil Court, Court No.13 at Ahmedabad passed a common order below Notice of Motion Exhs.6 and 34 in Civil Suit No.828 of 2000. Being aggrieved by the said order the aforesaid three appeals have been filed. The appellants in Appeal from Order No.113 of 2003 are the original defendants in the suit, while the appellant in Appeals from Order Nos.130 and 131 of 2003 is the original plaintiff in the civil suit. For the sake of convenience, hereinafter, the parties shall be referred to as the plaintiff and the defendants as described in the suit.

2. In the impugned order the trial Court has summarized its findings at paragraph 41 and thereafter passed the final operative order in paragraph 42 as under:

" 41. Considering above all facts and circumstances, I summarize my findings as under:-

(i) The defendant No.1 and consequently all defendants are entitled to use trade mark "Ramdev" for the retail business of spices in 7 outlets as mentioned in M.O.U.. It is not mandatory for the defendants to purchase goods from the plaintiff for retail sale in the said outlets. The defendants are at liberty to manufacture spices in their factory and carry on retail business in 7 outlets by using trade-mark "Ramdev" bearing registration No.44770.

(ii) The defendant No.1 is at liberty to run business under the trade name "Ramdev Masala" for retail and wholesale business of spices, instant mix and other articles. However, he should not use trade-mark "Ramdev" except 7 outlets as mentioned in M.O.U..

(iii) Label and packing adopted by the defendants for their goods under the trade-name "Swad" containing word "Ramdev Masala" is creating infringement of the trade-mark of the plaintiff as it is deceptively similar. Therefore, the

defendants should be prevented in using the word "Ramdev Masala" on their label and packing in any manner. However, the defendants are at liberty to manufacture and market spices in any trade name without using the word "Ramdev" or "Ramdev Masala".

42. Considering above all facts and circumstances, I pass following Order:-

O R D E R

Application exh.6 is allowed. The defendants, their servants, agents, partners or any other person, are hereby restrained by temporary injunction by using registered trademark, logo "Ramdev" or any other trade-mark, which is identical and deceptively similar to the trade-mark of the plaintiff, in respect of label and packing material of their goods except in seven outlets mentioned in M.O.U., till final disposal of the suit.

2. Application, exh.34 stands rejected. The defendants are at liberty to run business of spices under the trade name "Ramdev Masala" without using the registered trade-mark "Ramdev" except in seven outlets."

3. In Appeal from Order No.113 of 2003, the defendants have challenged the findings as summarized in para 41(iii) of the impugned order and prayed that the said direction restraining the defendants from using words "Ramdev Masala" on their label and packing should be quashed or in the alternative suitably modified.

4. In Appeal from Order No.130 of 2003, the plaintiff has prayed that findings recorded in para 41(i) and 41(ii) be quashed and set aside by granting relief as prayed for in application Exh.6.

5. In Appeal from Order No.131 of 2003 vide paragraph 12-A, a prayer is made to the effect that the impugned order be quashed and set aside to the extent, it rejects application Exh.34 and grant relief as prayed in application Exh.34 restraining the defendants from opening any branch / outlet under the name of Ramdev Masala, Ramdev Export or any other shop bearing the word "RAMDEV".

5.1 While in paragraph 12-B, it is prayed that the defendants be ordered not to proceed further in their pending applications for registration before the Registrar of Trade Marks containing the word "RAMDEV" till the disposal of the suit.

5.2 In relation to the aforesaid prayer at paragraph 12-B, it is required to be noted that the same cannot be granted for the simple reason that it does not arise out of the impugned order, in as much as, the trial Court has recorded in paragraph 4 of the impugned order that Mr.B.J.Shelat, the learned counsel for the plaintiff fairly conceded before the Court that he does not press relief claimed in paragraph No.17(3). This paragraph is paragraph number of application Exh.34 which is identical in terms to prayer 12-B of Appeal from Order No.131 of 2003. Therefore, the plaintiff having given up its claim to the said relief before the trial Court, it is not open to the plaintiff to now claim the said relief in this appeal.

6. The facts, briefly stated, are that the plaintiff is a Company incorporated under the Companies Act, 1956 on 06-01-1989. Defendant No.1, defendant No.3 and defendant No.5, were the directors of the plaintiff company and retired from the Company in 1998. Defendant Nos.2, 4 and 6 are respectively wives of defendant Nos.1, 3 and 5. Defendant Nos.7 and 8 are partnership firms which are constituted by defendant Nos.1 to 6 and / or their relatives. The plaintiff has filed a suit for preventing acts of infringement of trade mark, infringement of copyright and passing off being committed by the defendants by using the registered trade mark of the plaintiff, the art work and the word 'RAMDEV'.

7. In 1950, one Shri Rambhai Patel, since deceased, commenced a business in the name of 'Ramdev Flour Factory'. Rambhai had three sons, namely, Arvindbhai (defendant No.1), Hasmukhbhai and Pravinbhai (at present the directors of the plaintiff company). In or about 1968 late Shri Rambhai along with defendant No.1 commenced business in the name of 'Ramdev Masala Factory'.

7.1 On 01-10-1975 'Ramdev Masala Stores' was constituted as a partnership firm. One of the partners was Shri Arvindbhai Rambhai Patel, representing the firm of 'Ramdev Masala Grinding Factory'. The said Shri Arvindbhai Rambhai Patel joined firm of 'M/s.Ramdev Masala Stores' as an individual partner on 13-12-1977. On the same day Rambhai Chhagandas Patel also joined the

said firm and both Shri Arvindbhai and Shri Rambhai joined the said firm of M/s.Ramdev Masala Stores w.e.f. 06-04-1997. Minor Hasmukhbhai Rambhai Patel was admitted to the benefits of partnership w.e.f. 27-04-1979. The said minor Hasmukhbhai attained majority on 14-07-1979 and elected to become a partner in the said firm. Ultimately the said firm of M/s.Ramdev Masala Stores came to be dissolved on 04-11-1991.

8. M/s.Ramdev Masala Stores applied for registration of mark bearing No.447700 which comprised of the word "RAMDEV" in Hexagon shape in Gujarati below which was a small square wherein a picture of Hindu Saint / God 'Ramdev' riding a horse and bearing a long flag pole in right hand, and below that picture was the word "Masala" in Gujarati. Registration was granted to the said mark in 1989.

9. On 06-01-1989, 'Ramdev Food Products Pvt. Ltd.', a Private Limited Company, was incorporated jointly by late Rambhai, Arvindbhai, Hasmukhbhai and Pravinbhai as the original directors, original subscribers and shareholders.

10. On 20-05-1990, a Deed of Assignment dated 20-05-1992 recorded assignment of the registered trade mark bearing registration No.447700 whereunder the assignor, M/s.Ramdev Masala Stores, assigned the said trade mark to the assignee M/s.Ramdev Food Products Pvt. Ltd.

11. On 01-04-1991, a new firm called M/s.Ramdev Masala was established and the business thereof was stated to be sale of various spices like chilly powder, cumin-coriander powder, turmeric powder, and other spices after grinding the same.

11.1 Clause 12 of the said partnership deed stipulates that any partner could retire after giving written notice three months prior to the date of retirement after settling his account.

11.2 While Clause 13 of the partnership deed provides that in the event of retirement, or death or for any other reason if a partner does not continue as such, the partnership is not to be dissolved but the continuing partners are entitled to carry on the partnership firm after inducting the legal heirs of such outgoing partner or without inducting legal heirs as may be mutually agreed upon between the parties.

12. Between 1975 and 1991 the family members started various partnership firms for carrying on various diverse businesses but the word "RAMDEV" formed part of the name of the each firm so as to have the firm name beginning with the word "RAMDEV".

13. A Registered User Agreement was executed on 01-04-1991 for a period of seven years wherein the plaintiff was the registered proprietor and the user was defendant No.7, namely, M/s.Ramdev Masala. However, it is an agreed position between the parties that the said agreement was never got registered.

14. On 19-11-1992, a new partnership firm by the name of M/s.Ramdev Exports came into existence and the principal business was to export the products of the plaintiff.

15. It appears that disputes arose between the members of the family, and more particularly between three brothers, i.e. Arvindbhai, Hasmukhbhai and Pravinbhai and ultimately the said disputes were resolved by intervention of four persons acceptable to the disputing parties by execution of a Memorandum of Understanding dated 30-05-1998. Hereinafter the same shall be referred to as the M.O.U. for the sake of convenience.

16. On 12/15-12-1998, the plaintiff issued a notice for infringement of trade mark. On 23-12-1998, Civil Suit No.6264 of 1998 was filed by defendant No.7 and defendant No.1, namely, M/s.Ramdev Masala and Shri Arvindbhai Rambhai Patel on the basis that there was no complete assignment of the mark. Thereafter, it appears that various proceedings including issuance of public notices, criminal complaints, etc. took place between the parties. Ultimately on 10-02-2000 Civil Suit No.828 of 2000 was instituted by the plaintiff.

17. Mr.M.J.Thakore, the learned senior counsel appearing on behalf of the defendants, submitted that the impugned order restraining the defendants from using the trade mark "RAMDEV" except in seven outlets, and holding that the label and packing adopted by the defendants for their goods under the trade name "Swad" containing the word "Ramdev Masala" was creating infringement of the trade mark of the plaintiff as it was deceptively similar and thus restraining the defendants from using the word "Ramdev Masala" on their label and packing, was bad in law and not warranted on facts and evidence on record. It was contended that if the plaintiff was basing its action for infringement and for passing off without

relying upon the M.O.U., the plaintiff should not be permitted to refer to the terms of the M.O.U. and seek any relief on the basis of either compliance or violation of the terms of the M.O.U. That the plaintiff having not made out any prima facie case, was not entitled to interim injunction and the balance of convenience did not lie in favour of the plaintiff and hence, the impugned order should not be allowed to stand.

17.1 "RAMDEV" was the name of god / deity / saint having a strong following in Gujarat and Rajasthan particularly. It has been used as a trade name in various shops and establishments not only in the city of Ahmedabad but elsewhere and hence, the word "RAMDEV" was a public juris and irrespective of the registration of a label mark containing such a word, no one could claim any exclusive right to the use of the said word "RAMDEV".

17.2 The larger family of late Rambhai Chhagandas Patel have faith in Ramdev Pir and accordingly started using the word "RAMDEV" and the mark depicting the Pir in various businesses commenced right since 1950.

17.3 Even if the assignment whereby M/s.Ramdev Masala Stores transferred and assigned the registration mark bearing registration No.447700 was accepted as a valid assignment, yet M/s.Ramdev Masala Stores continued its firm name and business till 04-11-1991 despite the Assignment Deed being made effective from 20-05-1990.

17.4 That the firms M/s.Ramdev Masala and M/s.Ramdev Exports were started on 01-04-1991 and 19-11-1992 respectively. They have run concurrently and used the word "RAMDEV" in Hexagon with the plaintiff company, and the plaintiff company has never objected to such use. That similarly the plaintiff has also not objected to use of the trade names "M/s.Ramdev Masala" and "M/s.Ramdev Exports" despite the fact that Hasmukhbhai and Pravinbhai and their respective family members retired from the said two firms on 01-06-1998.

17.5 Therefore, it was submitted that acquiescence and waiver on part of the plaintiff company stood established and it had no right restraining the firms from using their firm names with whom the plaintiff company had dealt with by way of various business transactions.

17.6 That the present suit having been filed after a period of nine years after the firms commenced business disentitled the plaintiff from seeking any relief and at least no interim injunction could be granted.

18. As against this, Mr.B.J.Shelat, the learned counsel appearing on behalf of the plaintiff, contended that once it was established that a trade mark was registered and duly assigned under the provisions of The Trade and Merchandise Marks Act, 1958 ('the Act of 1958') the plaintiff was entitled to the protection provided by the Act of 1958 with special reference to Section 28 read with Section 29 and Section 32 of the Act of 1958.

18.1 That the registered mark contained the word "Ramdev" as well as the word "Masala" which were prefix and suffix to the figure of Pir Ramdev and hence if the same words were used in any combination so as to cause a deception in the mind of a consumer the plaintiff was entitled to an order of injunction in its favour for infringement and for passing off.

18.2 That the plaintiff was not a party to the M.O.U. and hence the terms of the same could not bind the plaintiff.

18.3 That the plaintiff had not passed any resolution nor permitted the defendants to use the mark and as such the M.O.U. cannot be used as the defence in infringement proceedings.

18.4 That reliance upon Section 33 by the defendants for the purpose of claiming prior user of the word "Ramdev" cannot help the defendants once registered trade mark was assigned by a valid Deed of Assignment and especially when M/s.Ramdev Masala Stores, the assignor firm, having been dissolved.

18.5 That M/s.Ramdev Masala was the firm which came into existence only in 1991 and was carrying on only retail sales outlets and, therefore, the said firm is not a prior user. Similar was the position in relation to the firm M/s.Ramdev Exports which came into existence only in 1992.

18.6 That the defendants could not be permitted to raise defence to the effect that the word "Ramdev" was public juris, in as much as, once it was established that there was a registered mark, a business carried on with reference to the said mark would acquire goodwill in course of time and the Court would always protect such a business.

18.7 That after assignment of 1990 the mark was permitted to be used under a Registered User Agreement or

at least under a license. That the defendant nos.7 and 8 have themselves applied for registration vide separate applications and hence, they could not raise a contrary defence that the word "Ramdev" is commonly used.

18.8 In so far as the defence regarding delay was concerned, it was submitted that there was no delay and immediately after a period of seven years of Registered User Agreement was over in December 1998, a notice in the form of letter had been issued. Thus, there was no delay or latches.

18.9 That accordingly the balance of convenience was in favour of the plaintiff and the defendants should be restrained from using the words "Ramdev" and "Masala" on any of its products or in the name of the firm.

19. Mr.Shelat also assailed the portion of the impugned order wherein the trial Court has recorded findings partially against the plaintiff by stating that the defendants could carry on any business including that of spices, and such business could be carried out not only at the seven outlets but also by opening other shops and establishments. The only requirements being that the firm must not use either the word "Ramdev" or the word "Masala" as a firm name or on any of its packing containing the goods sold by the defendants' firms.

20. The position in law is well settled that the grant of an interlocutory injunction during the pendency of legal proceedings is a matter requiring the exercise of discretion of the Court. While exercising the discretion the Court applies the following tests:

(i) Whether the plaintiff has a prima facie case;

(ii) Whether the balance of convenience is in favour of the plaintiff; and

(iii) Whether the plaintiff would suffer an irreparable injury if his prayer for interlocutory injunction is disallowed.

The decision whether or not to grant an interlocutory injunction has to be taken at a time when the existence of the legal right assailed by the plaintiff and its alleged violation are both contested and uncertain and remain uncertain till they are established at the trial on evidence. Relief by way of interlocutory injunction is granted to mitigate the risk

of injustice to the plaintiff during the period before that uncertainty could be resolved. (Reference - Gujarat Bottling Co. Ltd. Vs. Coca Cola Co. (1995) 5 SCC 545).

21. The Apex Court has in the decision of Colgate Palmolive (India) Ltd. Vs. Hindustan Lever Ltd. (1999) 7 SCC 1 specifically held that there would be various considerations in the matter of grant of interlocutory injunction, but the basic one would be non-expression of opinion as to the merits of the matter by the Court, since the issue of grant of injunction, usually, is at the earliest possible stage so far as the time-frame is concerned. After stating thus, the following seven other factors have been laid down in the said decision:

(i) extent of damages being an adequate remedy;

(ii) protect the plaintiff's interest for violation of his rights though, however, having regard to the injury that may be suffered by the defendants by reason therefor;

(iii) the court while dealing with the matter ought not to ignore the factum of strength of one party's case being stronger than the other's;

(iv) no fixed rules or notions ought to be had in the matter of grant of injunction but on the facts and circumstances of each case -- the relief being kept flexible;

(v) the issue is to be looked at from the point of view as to whether on refusal of the injunction the plaintiff would suffer irreparable loss and injury keeping in view the strength of the parties' case;

(vi) balance of convenience or inconvenience ought to be considered as an important requirement even if there is a serious question or prima facie case in support of the grant;

(vii) whether the grant or refusal of injunction will adversely affect the interest of the general public which can or cannot be compensated otherwise.

22. One more important factor which comes into play as per settled legal position is the stage at which the party alleging infringement or passing off against the defendant approaches the Court. In a case where the defendant is yet to commence its business and utilize either the mark or the name or any combination for the purpose of its trade or business and the plaintiff makes out a prima facie case, the plaintiff would become entitled to an order of interim injunction. However, in a situation where the business is a running business, and running not just before institution of the suit, but running since quite some time, it would be open to the Court to exercise discretion in favour of the defendant and refuse injunction taking into consideration the balance of convenience.

23. The role of an appellate Court in such matters has been stated thus by the Apex Court in case of Laxmikant V. Patel Vs. Chetanbhat Shah & Anr., AIR 2002 SC 275 :

"17. We are conscious of the law that this Court would not ordinarily interfere with the exercise of discretion in the matter of grant of temporary injunction by the High Court and the trial Court and substitute its own discretion therefore except where the discretion has been shown to have been exercised arbitrarily or capriciously or perversely or where the order of the Court under scrutiny ignores the settled principles of law regulating grant or refusal of interlocutory injunction. An appeal against exercise of discretion is said to be an appeal on principle. Appellate Court will not reassess the material and seek to reach a conclusion different from the one reached by Court below solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial Court reasonably and in a judicial manner the fact that the appellate Court would have taken a different view may not justify interference with the trial Court's exercise of discretion [(See Wander Ltd. V. Antox India P. Ltd., 1990 (Supp) SCC 727 and N.R.Dongre v.

Whirpool Corporation, (1996) 5 SCC 714)].
. . . ."

24. The trial Court has recorded in paragraph 6 of the impugned order that "both the learned senior counsel for the parties have fairly conceded before the Court that they relied on M.O.U. and, therefore, in present case, M.O.U. is the most important document". However, at the time of hearing Mr.Shelat contended that the trial Court has erred in recording such a concession, in as much as, no such concession was given on behalf of the plaintiff. Therefore, at the time of hearing both the sides made elaborate arguments on the basis that the plaintiff had a preliminary objection with regard to the M.O.U. and the terms recorded therein.

25. The facts narrated hereinbefore are not in dispute. What is pertinent to note is that the dissolution deeds of the firms which were carrying on various businesses between 1975 and 1991 have not come on record. The Dissolution Deed of M/s.Ramdev Masala Stores assumes importance in light of the fact that it was dissolved on 04-11-1991 i.e. after the date of assignment i.e. 20-05-1990. However, 20-05-1990 is the effective date. The Deed of Assignment has, in fact, been executed on 20-05-1992. The reason is not far to seek. If M/s.Ramdev Masala Stores, as a firm came to be dissolved on 04-11-1991, it could not have executed the Deed of Assignment on 20-05-1992, as the firm itself, which was registered proprietor of trade mark No.447700, was no longer in existence on the date of execution. Therefore, firstly, whether any person, who was a partner of the erstwhile firm M/s.Ramdev Masala Stores, could have executed the said document as a partner is a moot question. Without entering into that controversy, even assuming that the said Deed of Assignment was validly executed, the question yet remains is as to whether as per the Deed of Dissolution any of the partner was permitted or restrained from carrying on the same business by either using the same firm name or in any other name. In absence of the Dissolution Deed it is not possible to state either way. However, one thing is certain, and that is, M/s.Ramdev Masala, an independent firm, came into existence on 01-04-1991 and otherwise prior in point of time to the date of dissolution of M/s.Ramdev Masala Stores.

26. As already noted hereinbefore M/s.Ramdev Masala Stores was constituted originally on 01-10-1975 wherein one of the partners was the firm of Ramdev Masala Grinding Factory represented by Shri Arvindbhai Rambhai

Patel. Therefore, business of grinding of spices by using words "Ramdev" and "Masala" was carried on right since inception of the firm of Ramdev Masala Grinding Factory. The said business, it appears, was taken over by M/s.Ramdev Masala Stores. Thereafter, during existence of Ramdev Masala Stores, the firm of M/s.Ramdev Masala came into existence. The business of M/s.Ramdev Masala has already been narrated hereinbefore after referring to the partnership deed. The chain of events thus go to show that the business of grinding spices by using the words "Ramdev" and "Masala" in the formation of firm name continues all throughout. If this be the position at least prima facie, on the basis of documents listed, it is not possible to state that the trial Court was not justified in holding that the firm M/s.Ramdev Masala and M/s.Ramdev Exports i.e. the defendants could not be restrained from carrying on business of manufacturing and selling of spices.

27. There is one more aspect of the matter that the Registered User Agreement executed between the parties was not registered as no application for registration was ever made. It is an admitted position that despite absence of registration of the said agreement the defendants were permitted user of the registered mark, thus, denoting at least permissive user, even by way of an oral licence. The plaintiff did not take any action, but to the contrary, knowing fully well that the agreement was not registered, permitted the defendants to use the trade mark. This could lead to the inference that there was concurrent user without any objection from the plaintiff. This aspect would also have significance when the alternative contention as regards the plaintiff being aware of the M.O.U. is dealt with.

28. One more aspect of the matter is : is there any distinction between trade mark / logo on the one hand and trade name / firm name on the other hand. This aspect could have been resolved if dissolution deed of M/s.Ramdev Masala Stores would have been available. It might have thrown some light whether there was any restriction as regards use of the firm name involving user of the words "Ramdev" and "Masala". However, the Retirement Deeds which have been produced on record give a contrary indication when they positively permitted the continuing partners to carry on the same business under the same firm name. For example, Clause 4 of the Deed of Retirement dated 01-06-1998 of M/s.Ramdev Masala reads as under:

"4. That the continuing partners have taken

> over all the assets and liabilities at their book value as at 1st day of April, 1998 and the continuing partners have also decided to continue the said business in the same firm's name, viz. M/s.Ramdev Masala. "

The specific averment that continuing partners have also decided to continue the said business in the same firm name, namely, M/s.Ramdev Masala has been signed not only by the continuing partners but also by the retiring partners. The same is the position with regard to the Retirement Deed of defendant No.8, namely, M/s.Ramdev Exports wherein identical Clause 4 is found.

29. Again in both the Retirement Deeds Clause 3 specifically stipulates that the continuing partners become full owners and are entitled to continue as the partners without dissolving the firm. These documents specifically indicate that the use of the word "Ramdev" was consciously permitted by the outgoing partners and the firms were permitted to continue as such using the same firm name and carry on the same business without dissolving the firm. The outgoing persons are none else but directors of the plaintiff company.

30. The title of the Deed of Assignment of Registered Trade Mark No.447700 shows that it is of Ramdev Masala Label included in Class-30. The assignor is Ramdev Masala Stores, a registered partnership firm, while the assignee is Ramdev Food Products Pvt. Ltd., a Limited Company. The Deed of Assignment further records that the assignor has adopted the trade mark "Ramdev" containing or consisting word "Ramdev" and a device of Ramdev Pir and the said label is used by the assignor since 1963. The assignor agreed to assign the exclusive right of the registered trade mark Ramdev label with goodwill of the business of the mark to the assignee and the assignee has to purchase the said trade mark from the assignor on the terms and conditions mentioned in the deed. The terms of the Deed of Assignment specifically state that the trade mark is assigned with goodwill of the business and the assignee has now acquired exclusive right to use the said label.

31. Therefore, if the Deed of Assignment is read as a whole, it is apparent that the trade mark which consists of the word "Ramdev" in Gujarati in a Hexagon below which there is the picture / device of Ramdev Pir showing the deity riding a horse and holding a flag pole in his right hand, below which the word "Masala" in Gujarati is

printed is assigned. Thus, the entire trade mark is of a particular shape, depicting the words "Ramdev" and "Masala" in Gujarati respectively above and below the picture of Ramdev Pir and is more particularly treated as a label mark or a label. As already stated hereinbefore, the Deed of Assignment was executed on 20.05.1992. An application for registration of subsequent proprietor came to be made in the prescribed form on 11.06.1992 and the order of registration came to be made on 26.06.1992, but the same was made effective from 20.05.1990, as stated in the Deed of Assignment. The xerox copy of the registration entry produced at Page 34 of paper book No.1 goes to show that Ramdev Masala Stores has been described as manufacturers and merchants of all kinds of spices, Chili, Haldar, Dhana and Dhanajiru, etc.

32. Therefore, even if the M.O.U. is kept out of consideration it is apparent that the plaintiff was aware of the position that the various partnership firms, right since inception, used the words "Ramdev" and "Masala" as part of the firm name and the said firms, including M/s.Ramdev Masala Stores, the assignor, continued to exist under the same firm name even after the Deed of Assignment. In this context, it was submitted on behalf of the defendants that the defendants did not want to use the trade mark, never used the trade mark, and carried on the business under the brand name "SWAD". However, the defendants could not be prevented from using the firm name "M/s.Ramdev Masala" because under the law with special reference to the Rules framed under The Prevention of Food Adulteration Act, 1954, as well as Rules framed under the Standards of Weights and Measures (Packaged Commodities) Rules, 1977 the defendants were obliged to depict the name of the manufacturer as prescribed. It was contended that the moment the defendants were prevented from printing the name of the manufacturer on the packing, such a restriction would amount to restraining the defendants from running the business, or conduct the business in violation of the aforesaid statutory provisions and the same could not be permitted in any view of the matter.

33. Under the Prevention of Food Adulteration Act, 1954, Rules have been framed and under Rule 32(c)(i) of the Prevention of Food Adulteration Rules, 1955, a manufacturer is obliged to carry on every package of food a label specifying the name and complete address of the manufacturer and in case the manufacturer is not the packer, the name and complete address of the packing unit. Rule 36 of the said rules provides for principal display panel which means that part of a label which is

intended or is likely to be displayed, presented or shown or examined by the customer under normal and customary condition of sale or purchase of the commodity of food contained in the package. Sub-rule (2) of Rule 36 of the said rules specifically prescribes the shape of the container and the corresponding height and width of the principal display panel. Therefore, it is apparent that under the said Act and Rules which deal with Food Adulteration, a manufacturer is statutorily required to display its name and address by displaying the same at least in the manner, size and placement as prescribed.

34. Similarly, under the Standards of Weights and Measures Act, 1976, appropriate Rules have been framed being Standards of Weights and Measures (Packaged Commodities), Rules, 1977. Rules 7 and 10 of the Rules prescribe the minimum area of principal display panel, minimum height of any numerals, minimum height of letters, minimum width of letter or numeral used in the principal display panel. The grievance of the plaintiff, therefore, as regards printing of the name of manufacturer shall have to be appreciated in the context of the aforesaid legal requirements.

35. The case of the plaintiff was that printing of the name of the manufacturer in the manner undertaken by the defendants amounted to passing off and hence, the plaintiff was entitled to injunction as requested. It was submitted on behalf of the plaintiff that passing off action had to be determined on the basis of the nature of the marks i.e. whether the marks are word marks or label marks or composite marks; the degree of resemblance between the marks, phonetic similarity and hence, conveying similar idea; the nature of the goods and the similarity of the nature of the goods of rival traders; and the class of purchasers who are likely to buy the goods. That if all the aforesaid factors are cumulatively considered, the plaintiffs were entitled to having an order in their favour, restraining the defendants from not only using the words "Ramdev" and "Masala" in any manner whatsoever, but also ensuring that the said words did not convey similarity in deception on the class of purchasers because otherwise there would be deceptive similarity, not only phonetically but also otherwise.

36. Once a statute prescribes an obligation on a manufacturer and stipulates the minimum standard of measurement, the manufacturer is bound to act in accordance with law and cannot be restrained from complying with specific statutory provisions. Though

there is none, assuming there is any conflict between the provisions of the Act of 1958 on the one hand, and the Food Adulteration Act, 1954 and the Standards Act, 1976 on the other hand, all the provisions have to be read harmoniously so as to give effect to all the said statutes. In fact, during the course of hearing, on behalf of the defendants it was agreed that the defendants are agreeable to any direction as regards the manner, size and placement of the details which a manufacturer is required to print on a package, the only request being that the manufacturer could not be directed to act beyond the standards prescribed.

37. The M.O.U. has been entered into between the parties on 30-05-1998. Defendant No.1 Shri Arvindbhai Rambhai Patel is described as party of the first part and includes self, as Karta of H.U.F., for and on behalf of the members of the family, heirs, assignee and executor, etc. Shri Hasmukhbhai Rambhai Patel is party of the second part and Shri Pravinbhai Rambhai Patel is party of the third part, both of them have also been described more particularly as including the same entities as party of the first part. The preamble states that three parties to the M.O.U. are brothers and were carrying on business in a joint family and were holding business assets. That the family business had been commenced by late father, Rambhai Chhagandas Patel. However, differences of opinion have arisen between the parties in relation to the family businesses and for resolving the same, four well wishers of the family have been asked to act as umpire and as per their advice and suggestions, so as to maintain peace and goodwill in the family, various businesses and properties have been partitioned inter se. The M.O.U. which records this resolving of disputes is made effective from 01-04-1998 and the terms agreed between the parties have been reduced in writing. Paragraph 1 of the said M.O.U. states that Ramdev Food Products Limited was organized for development of family business of manufacture and trading in spices and instant mix and the said limited company was a family company and the shares were held by the members of the family and there was no outsider. Thereafter, Clause-A of the M.O.U. talks about property wherein the Registered Office of the Company is situated while Clauses-B and C refer to lands wherein the factory is situated for the purpose of manufacture, packing and dispatch. Paragraph 2 of the M.O.U. deals with various retail sales outlets. Paragraph 3 deals with the property of M/s.Ramdev Exports. Thereafter, it is stated that aforesaid business assets were held by the family members and three parties to the M.O.U. were interested in holding those

properties. In relation to the trade mark or trade name "Ramdev", it is stated that the same belongs jointly to the family for the purpose of the business of the family and as per understanding between the parties the said registered trade mark has become the ownership of the party of the second part and party of the third part and party of the first part has given up his right, title and interest in the same. Similarly, party of the first part has become exclusive owner of M/s.Ramdev Masala and M/s.Ramdev Exports and party of the second and third part have given up their right, title and interest in the said two firms and party of the first part has become the exclusive owner and is entitled to administer and carry on the said business. Thereafter, it is stated that as per the understanding arrived at between the parties, the parties of the second part and third part have become the owners of Ramdev Food Products Limited and party of the first part has given up his right, title and interest and parties of the second and third part have become exclusive owners of the company and are accordingly administering the Company. For the present, it is not necessary to further record as to how the properties held by the Limited Company have been transferred, but suffice it to state that the factory and open land situated at Survey Nos.311, 319/1, 319/2 and 310/2 has been transferred in favour of the party of the first part and parties of the second and third part have given up their right, title and interest in all immovable properties including the constructed factory situated on the Sola land. There are further terms in relation to various other assets including open lands as well as residential houses, jewellery and ornaments, etc. However, what is most material is that there is an overriding condition to the effect that if any of the parties to the M.O.U. decides not to carry on any business which has fallen to the share of that particular party, the said business is not to be sold to any outsider but has to be transferred to the other parties to the M.O.U. and only if such other parties decline, then such business could be sold to a third party i.e. an outsider. Similarly, parties of the second and third part agree that the trade mark shall not be given by them for use to any one and as and when they are not in need of the trade mark, the same shall be given to the party of the first part. At the same time, the seven sales outlets in the name of "Ramdev Masala" which have fallen to the share of the party of the first part shall be run by the party of the first part and till the said business is carried on in those seven outlets, party of the first part will be entitled to use the trade mark in relation to the retail sales made from those sales outlets after printing "NOT FOR

RESALE" on the packing and sales will have to be made only to the ultimate consumer.

38. Thus, on an overall reading of document as a whole, it is apparent that the entire document is in the nature of a family arrangement. What is most significant to note is that the entire document does not speak of any consideration passing from any one party to the M.O.U. to the other party despite the fact that which family business and which business assets shall be transferred from one to the other has been specifically recorded. At the same time, the Limited Company has also been treated as a family business and the business assets of the Limited Company have also been distributed by virtue of the terms recorded in the M.O.U. If this be the position, can the Limited Company take a stand that it being not the party to the M.O.U., the terms are not binding to the Limited Company viz. the plaintiff. The answer has to be in the negative.

39. There is no dispute as to the fact that Sola property viz. factory and open land, which were business assets of the Limited Company, stood transferred to defendant No.1 by virtue of the M.O.U. and it is not the case of the plaintiff that the plaintiff did not transfer the said property to defendant No.1. To the contrary, it is an admitted position between the parties that the said manufacturing unit has fallen to the share of defendant No.1 and the defendant No.1 is entitled to carry on business by utilizing the said business assets. The concept of the Limited Company being a separate legal entity, distinct from its share holders, would, in the peculiar facts and circumstances fail, in as much as, even if the principle of lifting of veil is not invoked, the conduct of the parties itself goes to show that the parties themselves have not differentiated between the corporate legal entity on the one hand and the share holders, who are only family members, on the other hand. The test is : did the Limited Company object to the arrangement under M.O.U. and refuse to transfer certain business assets, e.g. factory and land at Sola, to defendant No.1 and/or his nominees ? If the answer is NO, then the parties to the M.O.U. (particularly parties of the second part and third part) cannot be allowed to take shelter of corporate entity to wriggle out of the agreement entered into, especially when they showed no compunction while dealing with the same in M.O.U. as if it was their personal property. Therefore, the defendants are right in claiming that, alternatively, their case is governed by the terms of the M.O.U. and the trial Court had rightly considered the same as an

important document, on the basis of which the rights of the parties are governed and are required to be determined.

40. The entire tenor of the M.O.U., in no uncertain terms conveys that all the businesses described in the M.O.U. have been treated as family properties or family assets and distribution by way of family arrangement has taken place. Once this is so, the plaintiff cannot be heard to distance itself from the M.O.U. on the one hand and yet seek implementation of the terms of the M.O.U. on the other hand at the hands of the defendants. This comes in sharp focus when one considers the application Exh.34, wherein the plaintiff has sought to restrain the defendants from opening new outlets and carrying on business in such newly opened shops and establishments. The reference to seven outlets is only found in the M.O.U. and that is the basis, on which the plaintiff has sought to initiate action. Similarly, the plaintiff has stated that the retail sales to be made from the seven outlets should be only of goods manufactured by the plaintiff and purchased by the defendants from the plaintiff. If the M.O.U. is kept out of consideration, this prayer of the plaintiff loses its meaning altogether because there is otherwise no obligation for the defendants to purchase any goods from the plaintiff and sell them.

41. The summary of findings in paragraph 41 of the impugned judgement has already been reproduced hereinbefore. The findings in paragraph 41(ii) and 41(iii) of the impugned judgement are contradictory in nature. In paragraph 41(ii) it is stated by the trial Court that defendant No.1 is at liberty to run business under the brand name "Ramdev Masala" for retail and wholesale business of spices, etc. However, in paragraph 41(iii) the trial Court states that defendants should be prevented from using the word "Ramdev Masala" on their label and packing in any manner. This goes to show that the trial Court has mixed up the issues while granting interlocutory injunction.

42. Therefore, in light of what is stated hereinbefore, it is apparent that the impugned judgment and order is required to be upheld except modifying to a limited extent as under:

42.1 The finding recorded in paragraph 41(i) of the impugned judgment does not deserve any interference and is confirmed.

42.2 Similarly, finding recorded in paragraph 41(ii) of the impugned judgment and order does not deserve any interference and is confirmed.

42.3 However, finding in paragraph 41(iii) of the impugned judgment requires to be modified. The trial Court was in error for the aforestated reasons when it held that printing and publication of the principal display panel was creating infringement of trade mark as it was deceptively similar. The defendants cannot be prevented from using the words "Ramdev" and "Masala" on their label and packing in light of the statutory requirement as stated hereinbefore. However, the defendants shall print the name of the manufacturer using only the minimum standard prescribed, depending upon the nature of the packing, and the placement of the principal display panel shall be only at the bottom on the reverse side of the packing and the front portion of the packing shall not carry any principal display panel except for its own brand name "SWAD".

43. Accordingly, impugned order stands modified as aforesaid till final disposal of the suit.

44. The observations made hereinbefore are only prima facie expression of opinion for arriving at a decision at this stage, and shall not be treated as conclusive. It shall be open to the parties to lead evidence and raise all contentions in accordance with law at the trial, and the suit shall be decided accordingly.

45. The Appeal From Order No.113 of 2003 is accordingly partly allowed to the aforesaid extent, while Appeal from Order Nos.130 and 131 of 2003 are dismissed.

Registry to place copy of this order in all connected matters.

Sd/-

[D.A.MEHTA, J]

* * *

'Bhavesh'